

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

HOWARD TRIPP,
Appellant,

v.

DEPARTMENT OF THE AIR FORCE,
Agency.

DOCKET NUMBER
DA0752930240-I-1

DATE: NOV 16 1993

Shelby W. Hollin, Esquire, San Antonio, Texas, for the
appellant.

James A. Harper, Esquire, Kelly Air Force Base, Texas,
for the agency.

BEFORE

Ben L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member

OPINION AND ORDER

The appellant has petitioned for review of the May 21, 1993 initial decision that dismissed his appeal for lack of jurisdiction. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this appeal on our own motion under 5 C.F.R. § 1201.117, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still DISMISSING the appeal for lack of jurisdiction.

The agency promoted the appellant from the WG-12 position of Electronics Mechanic to the WS-9 position of Electronics Mechanic Foreman effective August 13, 1989, subject to the completion of a 1-year probationary period. See Initial Appeal File (IAF), Tab 1, Subtab D1 at 2. The agency subsequently demoted him to a WG-12 Electronics Mechanic position for allegedly failing to satisfactorily complete his supervisory probationary period, effective October 22, 1989, and revoked his certification to perform as a "Team Chief." IAF, Tab 1 at 1, Subtabs D2, D3 at 2. The appellant retired on February 3, 1990. See IAF, Tab 1, Subtab E1.*

The appellant filed a February 20, 1993 petition for appeal with the Board alleging that he was constructively removed from his position because his retirement was involuntary and resulted from the agency's discrimination against him on the bases of race (black) and age (59), and constituted retaliation for his having filed equal employment opportunity (EEO) complaints in 1981 and 1985. See IAF, Tab 1. The agency responded in opposition to his petition and moved that the appeal be dismissed for lack of jurisdiction. *Id.*, Tab 4.

* The appellant filed a formal equal employment opportunity (EEO) complaint of his demotion before he retired, on January 31, 1990. See IAF, Tab 1, Subtabs A1, D3 at 1-9, E2. In a January 29, 1993 decision, the agency determined that the appellant did not establish that he was discriminated against on the bases of race, age, or in retaliation for protected EEO activities when he was demoted and allegedly forced to retire. *Id.*, Subtabs A1, D3 at 1-9.

The administrative judge informed the appellant in an acknowledgment order that the Board presumes that retirement actions are voluntary and that his appeal would be dismissed unless he amended his petition to allege that his resignation resulted from duress, coercion, or misrepresentation by the agency supported by facts which, if proven, would establish that his resignation was involuntary. The administrative judge ordered him to file evidence and argument proving that the action was within the Board's jurisdiction. See IAF, Tab 2.

The appellant responded to the acknowledgment order. See IAF, Tab 3. He alleged, inter alia: That the agency failed to formally notify him of his supervisory probationary period or performance standards when he was promoted; that it discriminated against him in evaluating his performance that led to his demotion; that it did not follow the proper regulations in effecting his demotion and decertification; that it made "misrepresentations ... which impacted on [his] decision to retire," *id.* at 3; and that "[d]uress and coercion [were] implicit in the agency's reaction to the EEO counselor attempting to resolve [the appellant's EEO] complaint," *id.* The appellant also alleged that his retirement was forced on him because: He "was embarrassed in front of [his] fellow workers because they knew [that he] had been downgraded ... [and he] found the working conditions to be intolerable as a result, and therefore, had no choice but to retire," *id.* at

2-3; and working in the lower-graded position caused him stress and was detrimental to his health, *id.* at 2.

In an initial decision based on the record, the administrative judge found that the appeal was not within the jurisdiction of the Board and that a ruling on the timeliness of the petition for appeal was unnecessary. See Initial Decision at 1 n.1. The administrative judge found, *inter alia*, that the appellant's retirement was presumed voluntary unless he showed that: (1) He involuntarily accepted the terms of the agency; (2) circumstances presented no other alternative; and (3) those circumstances were the result of coercive acts by the agency, or his retirement was obtained by agency misinformation or misrepresentation. *Id.* at 2. The administrative judge found that: The fact that the appellant was embarrassed by his demotion did not establish that he was forced to retire; he described no specific actions by his supervisors or co-workers that made his working conditions unbearable; there was no evidence that the agency sought his retirement before or after his demotion; and the appellant did not explain how the alleged failure of agency officials to truthfully cooperate with the EEO counselor led to his decision to retire. *Id.* at 2-4. The administrative judge also found that the appellant was not entitled to a jurisdictional hearing because he failed to raise a nonfrivolous allegation that his retirement was involuntary, and that his claims of race and age discrimination could not

be considered because such allegations are not an independent source of Board jurisdiction. *Id.* at 4-5.

The appellant has timely petitioned for review of the initial decision. See Petition for Review File (PRF), Tab 1. The agency has timely responded in opposition to his petition. *Id.*, Tab 2.

ANALYSIS

We reopen this appeal to correct the administrative judge's finding in the initial decision that the appellant's allegations of discrimination cannot be considered absent a finding that his appeal is within the jurisdiction of the Board. See Initial Decision at 5 n.4. An administrative judge may properly consider claims of discrimination and retaliation in an alleged involuntary retirement appeal for the limited purpose of determining whether such claims support the appellant's allegation of coercion. See *Burke v. Department of the Treasury*, 53 M.S.P.R. 434, 438 (1992); *Day v. Department of Housing & Urban Development*, 50 M.S.P.R. 680, 684 (1991), *aff'd*, 975 F.2d 870 (Fed. Cir. 1992) (Table).

However, we find that the administrative judge otherwise correctly considered the appellant's allegations of discrimination and retaliation in reaching his finding that the appellant's retirement was voluntary and not coerced. See Initial Decision at 3-4. Claims of discrimination such as those offered by the appellant that are not accompanied by allegations specifying particular acts of harassment, discrimination, or retaliation are insufficient to support a

prima facie case of involuntariness and do not entitle the appellant to a hearing. See *Collins v. Defense Logistics Agency*, 55 M.S.P.R. 185, 188-90 (1992). Further, even assuming that the agency's alleged actions were discriminatory and retaliatory, the appellant still failed to show how those actions coerced his retirement. See *Burke*, 53 M.S.P.R. at 439; see also Initial Decision at 3-4.

Accordingly, we find that the administrative judge's error did not affect the appellant's substantive rights because the initial decision correctly found that the appellant's allegations of coercion were insufficient to support a prima facie case of involuntariness, and thus that the Board lacks jurisdiction over this appeal. See *Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:



Robert E. Taylor
Clerk of the Board

Washington, D.C.